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## Legislative Intentions in Antonin Scalia's and Bryan Garner's Textualism

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## Essay

### Legislative Intentions in Antonin Scalia's and Bryan Garner's Textualism

JEFFREY GOLDSWORTHY

*In Reading Law, the late Justice Antonin Scalia and his co-author Bryan Garner defend "pure textualism," partly because they deny that legislatures can have any intentions other than to enact statutory texts. This denial would, if adhered to rigorously, make their version of textualism unviable. It is inconsistent with context and purpose being used to (a) dispel ambiguities, (b) correct scrivener's errors, (c) reveal presumptions or background assumptions that qualify literal textual meanings, (d) reveal most kinds of implicit and implied content, and (e) resolve conflicts between the interpretive canons. It would, in other words, entail hyperliteralism, which Scalia and Garner explicitly reject. This is no doubt why, as I show, they do not rigorously adhere to that denial. To the contrary, in accepting that context and purpose can be used to do all these things, they frequently rely on legislatures having intentions in addition to merely enacting statutory texts. Notwithstanding their theoretical dismissal of substantive legislative intentions as non-existent, their actual interpretive practice confirms the intentionalist thesis that sensible interpretation of enacted laws necessarily presupposes the existence of such intentions, and endeavors to reveal and clarify them.*

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# Legislative Intentions in Antonin Scalia's and Bryan Garner's Textualism

JEFFREY GOLDSWORTHY \*

## I. INTRODUCTION: SCALIA'S AND GARNER'S TREATMENT OF SUBSTANTIVE LEGISLATIVE INTENTIONS

In *Reading Law*, the late Justice Antonin Scalia and his co-author Bryan Garner (collectively, "SG") advocate "pure textualism."<sup>1</sup> This requires "[a]n interpretation based purely on the words of a governing text, in their context, as the sole legitimate guides to meaning,"<sup>2</sup> which "begins and ends with what the text says and fairly implies."<sup>3</sup> It follows that "neither a word nor a sentence may be given a meaning that it cannot bear,"<sup>4</sup> "except in the rare case of an obvious scrivener's error."<sup>5</sup> They condemn any departure from textual meaning in order to give effect either to extra-textually derived intentions or purposes, or to consequences perceived as undesirable.<sup>6</sup> On the other hand, they distinguish their own "pure textualism" from "strict interpretation" or "hyperliteralism," mainly because those approaches ignore context, including statutory purpose, and cannot accommodate implications.<sup>7</sup>

SG say that textual meaning is determined by "[n]othing but conventions and contexts."<sup>8</sup> "Anglo-American law has always been rich in interpretive conventions," which include ordinary linguistic conventions and special legal ones.<sup>9</sup> Many of them, of both kinds, are embodied in so-called "canons" of interpretation, which SG aim to revive after a period of unfortunate relative neglect.<sup>10</sup> They estimate that the canons they endorse as "valid" represent only about a third of the possible candidates

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<sup>1</sup> ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS*, at xxix (2012).

<sup>2</sup> *Id.* at 431.

<sup>3</sup> *Id.* at 16.

<sup>4</sup> *Id.* at 31, 40.

<sup>5</sup> *Id.* at 57.

<sup>6</sup> *Id.* at xxvii, 394–95.

<sup>7</sup> *Id.* at 39–41, 356–57, 427, 431.

<sup>8</sup> *Id.* at xxvii.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at xxvii–xxviii, 9.

that can be found in law reports;<sup>11</sup> they have rejected the others for being “incoherent, not genuinely followed, or in plain violation of our constitutional structure.”<sup>12</sup>

Their textualism is motivated primarily by normative concerns, in particular, that judicial departures from textualism greatly expand judicial discretion, consequently undermining the rule of law and usurping lawmaking power that is constitutionally vested in legislatures.<sup>13</sup> But it also seems motivated partly by their denial that legislatures can have substantive intentions. While acknowledging that the language of legislative intent has infused judicial discourse for “more than 600 years,”<sup>14</sup> they boldly claim that

[in] the context of legislation . . . collective intent is pure fiction because dozens if not hundreds of legislators have their own subjective views on the minutiae of bills they are voting on – or perhaps no views at all because they are wholly unaware of the minutiae. . . . There is no single set of intentions shared by all. The state of the assembly’s collective psychology is a hopeless stew of intentions . . . . Yet a majority has undeniably agreed on the final language that passes into law. That is all they have agreed on . . . .<sup>15</sup>

“The stark reality is that the only thing that one can say for sure was agreed to by both houses and the President (on signing the bill) is the text of the statute. The rest is legal fiction.”<sup>16</sup> They go so far as to assert that “it is high time that further uses of *intent* in questions of [statutory] interpretation be abandoned.”<sup>17</sup>

I will argue that their denial that legislatures can have any intentions other than to enact particular texts would, if adhered to rigorously, make their version of textualism unviable. It would entail hyperliteralism, which we have seen they reject. But I will show that they do not rigorously adhere to that denial; to the contrary, they frequently rely on legislatures having intentions in addition to merely enacting statutory texts, including: (a) intentions that statutory language has particular meanings, (b) intentions that those meanings communicate particular norms, and (c)

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<sup>11</sup> *Id.* at 9.

<sup>12</sup> *Id.* at 31.

<sup>13</sup> They also argue that a textualist approach will motivate legislatures to legislate more carefully. See *id.* at 100, 344–45 (illustrating what happens when courts apply unwise law as written—legislatures cure it, statutes books become more complete, and there are fewer judge-made exceptions).

<sup>14</sup> *Id.* at 395–96.

<sup>15</sup> *Id.* at 392–93. They also approve of the statement that “whenever a law is adopted, all that is really agreed upon is the words.” *Id.* at 397 n.4 (quoting Josef Kohler, *Judicial Interpretation of Enacted Law*, in *SCIENCE OF LEGAL METHOD* 187, 196 (1917)).

<sup>16</sup> SCALIA & GARNER, *supra* note 1, at 376.

<sup>17</sup> *Id.* at 396.

intentions (called purposes) that those norms should achieve particular objectives. Despite their theoretical dismissal of most legislative intentions as fictional, their actual interpretive practice corroborates the view of intentionalists, such as Rick Kay, Larry Alexander, Richard Ekins, and me, that sensible interpretation of enacted laws necessarily presupposes the existence of such legislative intentions and endeavors to reveal and clarify them.<sup>18</sup> Scalia provides yet another example of a phenomenon noted by Ekins and me:

Judges who deny the reality of legislative intentions find it impossible to avoid regular and apparently orthodox reference to them. When they put theory aside, and actually read statutes, they rarely practise what they preach. They invariably resort to some kind of intentionalism.<sup>19</sup>

## II. SG'S MORE QUALIFIED STATEMENTS ABOUT LEGISLATIVE INTENTION

In contrast to SG's strong assertion that substantive legislative intentions are non-existent, they often write of such intentions more sympathetically. They quote with approval other judges and authors who assert the importance of legislative intentions. For example, they describe as "accurate" the statement that "the real object of . . . interpretation . . . is merely to ascertain the meaning and will of the lawmaking body,"<sup>20</sup> and say that:

Interpretation . . . is "the ascertainment of the thought or meaning of the author of . . . a legal document, as expressed therein, according to the rules of language and subject to the rules of law."<sup>21</sup>

They also quote approvingly Sir Edward Coke's statements that a legal text should be construed as a whole because the sense of one clause can be

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<sup>18</sup> Rick Kay has not discussed statutory interpretation at length, focusing instead on constitutional interpretation. But most of his arguments about constitutions transfer smoothly to statutes. He has confirmed to me that in his view, "every instance of enacted law should be interpreted so as to effectuate the intentions of the enactors." E-mail from Richard S. Kay, President, Am. Soc'y of Comparative Law, to author (May 22, 2019) (on file with author).

<sup>19</sup> Richard Ekins & Jeffrey Goldsworthy, *The Reality and Indispensability of Legislative Intention*, 36 SYDNEY L. REV. 39, 59 (2014). See also LAWRENCE M. SOLAN, *THE LANGUAGE OF STATUTES: LAWS AND THEIR INTERPRETATION* 101–03, 110 (2010) (suggesting that Justice Scalia's "rationale for using ordinary meaning is that it serves as a surrogate for legislative intent").

<sup>20</sup> SCALIA & GARNER, *supra* note 1, at 15 (quoting WILLIAM M. LILE ET AL., *BRIEF MAKING AND THE USE OF LAW BOOKS* 337 (3d ed. 1914)).

<sup>21</sup> *Id.* at 53 (quoting H.T. Tiffany, *Interpretation and Construction*, in 17 *AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW* 1, 2 (David S. Garland & Lucius P. McGehee eds., 2d ed. 1900)).

found “by the words or obvious intent of the other” which “expresseth the meaning of the makers.”<sup>22</sup>

Their claims that legislative intentions are fictional are frequently unclear and inconsistent. They say that “the genuine intent of the legislators” is “nonexistent,”<sup>23</sup> but also that the “subjective intention” of lawmakers is “almost always . . . a legal fiction, and when not that, an unascertainable reality.”<sup>24</sup> At one point, they refer to “the *ignis fatuus* [delusion] known as ‘drafter’s intention,’” immediately after suggesting that such an intention might be “apparent from text and context.”<sup>25</sup>

In their Glossary, they define “legislative intent” as: “The design or plan that the enacting legislature had for the application of a statute to specific situations that might arise,” and comment that “[w]hen this design or plan is not apparent from the text, it is a fictional intent that cannot be reliably ascertained.”<sup>26</sup> It is notable that: (a) they seem to concede that the legislature can have such a design or plan, which differs from just an intention to enact the text; (b) such an intent can hardly be “fictional” if it can sometimes be apparent from the text; (c) if it can exist, it seems doubtful that there is only one way of ascertaining it—namely, from the text—particularly given that elsewhere they concede that context as well as text is crucial to interpretation; (d) if it were indeed “fictional,” the word “reliably” would be inapt, since something that does not exist cannot be ascertained at all; and (e) this definition does not include broader intentions such as purposes, or assert that they are also fictional. We will later see that SG acknowledge the existence of legislative purposes.

Elsewhere, SG agree that it is “entirely correct” to say that “rules of grammar govern unless they contradict legislative intent or purpose,” provided that the statement “refers to legislative intent or purpose manifested in the only manner in which a legislature can authoritatively do so: in the text of the enactment.”<sup>27</sup> Comments similar to (a), (b), and (c) could be made about this statement.

There are many references in the book to what the drafters of laws probably meant, intended or had in mind, although it is usually unclear whether or not they use the term “drafters” to mean something different from “lawmakers.”<sup>28</sup> SG insist that the interpreter’s mission is to “determine what the drafter has actually said,”<sup>29</sup> but when that is *prima*

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<sup>22</sup> SCALIA & GARNER, *supra* note 1, at 167 (quoting Sir Edward Coke, *The First Part of the Institutes of the Laws of England, or a Commentary on Littleton* § 728, at 381a (14th ed. 1791)).

<sup>23</sup> *Id.* at 394.

<sup>24</sup> *Id.* at 435.

<sup>25</sup> *Id.* at 206.

<sup>26</sup> *Id.* at 432.

<sup>27</sup> *Id.* at 140.

<sup>28</sup> *Id.* at 18, 29, 30, 32, 156 (referring to the drafters as enacting the text).

<sup>29</sup> *Id.* at 206.

facie uncertain, they sometimes rely explicitly on evidence of what the drafter had “in mind.”<sup>30</sup> For example, they quote with apparent approval a judicial statement that “had the drafters of the statute intended” a phrase to bear a certain meaning, they could have used different wording.<sup>31</sup> Later, in a different context, they approve the same reasoning, whereby a proposed interpretation was properly rejected because, as Judge Jerome Frank “memorably noted[,]” “there would have been straightforward ways for legislators to arrive at” the desired result.<sup>32</sup> As the Judge put it:

Congress knows—who would not?—how to prevent such double taxation. A short sentence would have done the trick. The familiar ‘easy-to-say-so-if-that-is-what-was-meant’ rule of statutory interpretation has full force here. The silence of Congress is strident.<sup>33</sup>

Judge Frank was explicitly inferring what Congress probably meant—or intended—from its failure to include words that were obviously needed and could easily have been included to achieve a different outcome.

In disagreeing with a Canadian decision that the statutory term “*ordinances*” meant “laws made by a legislative body,” SG say that “[t]here is no more reason to believe that *ordinances* were meant to be similar to *Acts* in regard to the nature of the promulgator than there is to believe that they were meant to be different in that regard.”<sup>34</sup> They are surely referring to what the drafters or lawmakers meant by using the term, which amounts to referring to what they intended by using it.

### III. SG’S INTERPRETIVE METHODOLOGY

#### A. The “Fair Reading” of the Text

One of SG’s central ideas is that textualists seek a “fair reading” of a legal text, which is an “objectivizing construct.”<sup>35</sup> It is defined as follows:

The interpretation that would be given to a text by a reasonable reader, fully competent in the language, who seeks to understand what the text meant at its adoption, and

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<sup>30</sup> *Id.* at 206.

<sup>31</sup> *Id.* at 150 (citing *Waxham v. Smith*, 70 F.2d 457, 459 (9th Cir. 1934)).

<sup>32</sup> *Id.* at 181.

<sup>33</sup> *Commissioner v. Beck’s Estate*, 129 F.2d 243, 245 (2d Cir. 1942) (citation omitted).

<sup>34</sup> SCALIA & GARNER, *supra* note 1, at 196.

<sup>35</sup> *Id.* at 33–41, 393.



who considers the purpose of the text but derives purpose from the words actually used.<sup>36</sup>

Elsewhere, they suggest that a fair reading is how “an informed, reasonable member of the community,” who is “fully competent in the language” and “aware of all the elements (such as the canons) bearing on the meaning of the text,” “would have understood the text at the time it was issued.”<sup>37</sup>

This idea in itself does not render the concept of legislative intention irrelevant, because such a reasonable reader might regard legislative intention as “bearing on the meaning of the text”—insofar as this is consistent with the canons. SG themselves say they would have no quarrel with a search for legislative intent if it were confined to deriving intent “solely from the words of the text.”<sup>38</sup> Moreover, they acknowledge that a legislative intention can be derived from the text of a law even in the absence of “an express provision”;<sup>39</sup> presumably, it can be implied by the text. The same is true of “purpose.”<sup>40</sup> On one reading, what they oppose is reliance on “subjective intent” derived from sources extrinsic to the text, which are “lawmakers’ unenacted desires.”<sup>41</sup> Yet they also insist that context as well as text is crucial to interpretation.

## B. *Context*

SG insist that the textualist search for “the accepted contextual meaning that the words had when the law was enacted.”<sup>42</sup> They go so far as to say that “the soundest legal view seeks to discern literal meaning in context.”<sup>43</sup> Their willingness to take context into account (which, of course, common lawyers have always done) suggests that they should perhaps call themselves “contextualists” rather than “textualists.” More importantly, most linguists and philosophers of language regard context as relevant to meaning mainly because it is evidence of authorial purpose and intention. So, when SG rightly say that ambiguity and vagueness can

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<sup>36</sup> *Id.* at 428. *See also id.* at 15–16 (“[W]ords mean what they conveyed to reasonable people at the time they were written—with the understanding that general terms may embrace later technological innovations.”).

<sup>37</sup> *Id.* at 33, 393, 428, 435 (providing the definition of “original meaning” and explanation of “fair reading”).

<sup>38</sup> *Id.* at 30.

<sup>39</sup> *Id.* at 291.

<sup>40</sup> *Infra* Part III.C (“Purpose”).

<sup>41</sup> SCALIA & GARNER, *supra* note 1, at 29–30.

<sup>42</sup> *Id.* at 16.

<sup>43</sup> *Id.* at 40. *See also id.* at 167 (“Perhaps no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts . . . . Context is a primary determinant of meaning.”).

“often be clarified by context,”<sup>44</sup> they are vulnerable to the retort that this is because context is evidence of which sense of a word the author or speaker probably had in mind.

The book suffers from at least one serious omission. In its eagerness to dismiss the relevance of legislative history, it almost entirely fails to acknowledge common law courts’ long-standing willingness to take into account other extra-textual—including historical—evidence of probable legislative intentions and purposes, including the pre-existing state of the common law and statute law, notorious historical facts of which judicial notice could properly be taken, and so on. Such evidence has generally been regarded as admissible in common law jurisdictions, including the United States.<sup>45</sup> I say that the book “almost entirely” fails to acknowledge this because in advocating originalism in interpreting the Constitution, it concedes that the meaning of constitutional provisions can legitimately be clarified by pertinent historical facts that were well known to the founders. For example, they argue that the interpretation of the Second Amendment was greatly assisted by “the historical knowledge (possessed by the framing generation) that the Stuart Kings had destroyed the people’s militia by disarming those whom they disfavoured.”<sup>46</sup> Whether or not this is true, it concedes the general principle that the historical background to a law, if probably known to the lawmakers, can clarify the law’s meaning—and that can only be because it clarifies the lawmaker’s likely intentions.

### C. *Purpose*

SG regard “the purpose of the text” as “a vital part of its context.”<sup>47</sup> Since “words are given meaning by their context, and context includes the purpose of the text,” textualist interpretation “almost always” considers

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<sup>44</sup> *Id.* at 33. *See also id.* at 70 (explaining that interpretation will not be “straightforward and easy,” and that most common English words have multiple dictionary definitions, “some of them quite abstruse and rarely intended” and “[o]ne should assume the contextually appropriate ordinary meaning unless there is reason to think otherwise . . . which [also] ordinarily comes from context”).

<sup>45</sup> *See, e.g.*, SIR PETER BENSON MAXWELL, *ON THE INTERPRETATION OF STATUTES* 20–21 (1875); PETER ST. JOHN LANGAN & SIR PETER BENSON MAXWELL, *MAXWELL ON THE INTERPRETATION OF STATUTES* 47–50 (12th ed. 1969); ELMER A. DRIEDGER, *CONSTRUCTION OF STATUTES* 149–51 (2d ed. 1983); JOHN BELL & SIR GEORGE ENGLE, *STATUTORY INTERPRETATION* 140–42 (2d ed. 1987); G. E. DEVENISH, *INTERPRETATION OF STATUTES* 127–29, 130–33 (1992); DONALD GIFFORD, *STATUTORY INTERPRETATION* 117–19 (1990); Henry Campbell Black, *Chapter VII: Extrinsic Aids in Statutory Construction: Contemporary History*, in *HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS* 285–89 (2d ed. 1911); 2 J. G. SUTHERLAND & FRANK E. HORACK, JR., *STATUTES AND STATUTORY CONSTRUCTION* 482–83 (3d ed. 1943).

<sup>46</sup> SCALIA & GARNER, *supra* note 1, at 400–01.

<sup>47</sup> *Id.* at 33.

purpose.<sup>48</sup> Since “evident purpose always includes effectiveness,”<sup>49</sup> the text should always be interpreted so as to carry out rather than defeat its “manifest object”<sup>50</sup>—“the textually manifest purpose of the act.”<sup>51</sup> But that purpose “cannot be used to contradict text or to supplement it,”<sup>52</sup> it “sheds light only on deciding which of various *textually permissible meanings* should be adopted.”<sup>53</sup>

SG frequently insist that purpose must be derived exclusively “from the text, not from extrinsic sources” including legislative history.<sup>54</sup> The only relevant purposes are “concrete manifestations as deduced from close reading of the text.”<sup>55</sup> “The only goals inarguably sought . . . are those embodied in the enacted text.”<sup>56</sup> They seem keen to avoid referring to legislatures having purposes and go so far as to refer to “[t]he evident purpose of what a text seeks to achieve.”<sup>57</sup> But it is surely obvious that, strictly speaking, texts do not seek to achieve anything; “text” here must be a metonym for the maker of the text—the lawmaker(s). SG seem to be using terminology similar to what they elsewhere refer to disparagingly as “the oddly anthropomorphic phrase *intent of the document*,” which they say “invites fuzzy-mindedness.”<sup>58</sup> But there, they are suggesting that *any* reference to “intent” is dangerous, whereas they do not advocate expunging “purpose” from the vocabulary of interpretation.

They claim that “finding a purpose in text” is normally “straightforward.”<sup>59</sup> “The subject matter of the document” is “its purpose, broadly speaking;”<sup>60</sup> for example, in the case of a statute imposing a tax, “[t]he purpose is to contribute to the fisc.”<sup>61</sup> Actually, this is often incorrect; tax laws often aim to encourage or discourage particular activities. But the fact that the purpose of a law may often be obvious does not diminish the fact that it is really the purpose of the lawmaker. Such a purpose is a kind of intention. As I have argued elsewhere:

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<sup>48</sup> *Id.* at 56. *See also id.* at 20 (“supposed antonym” textualism does not “preclude[] consideration of a text’s purpose. . . . [T]he textualist routinely takes purpose into account, but in its concrete manifestations as deduced from close reading of the text”).

<sup>49</sup> *Id.* at 63.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 40.

<sup>52</sup> *Id.* at 57.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 56; *see also id.* at 34, 383.

<sup>55</sup> *Id.* at 20; *see also id.* at 34 (noting that purpose comes only from the text).

<sup>56</sup> *Id.* at 383.

<sup>57</sup> *Id.* at 20; *see also id.* at 33 (explaining SG’s “Fair Reading” method).

<sup>58</sup> *Id.* at 30; *cf. id.* at 394 (noting their approval of the term “statutory intent” (emphasis omitted)).

<sup>59</sup> *Id.* at 34.

<sup>60</sup> *Id.* at 56.

<sup>61</sup> *Id.* at 34.

[S]trictly speaking legal norms—like other inanimate objects—do not have purposes. A purpose is a kind of intention: an intention to achieve something. Only intelligent, reasoning beings can have intentions and purposes. It is true that we casually say things such as: ‘the purpose of a hammer is to bang in nails’. But a hammer does not have a purpose of its own, which is independent of the purposes of human beings. Its purpose must be the purpose for which it was either designed, or acquired, in order to be used, or for which it is in fact used, and that must be a purpose of the person or people who either designed, acquired or use it. The purpose of a hammer that has not yet been purchased might differ from that of a hammer that has been purchased for some idiosyncratic purpose, such as to form part of a sculpture. The purpose of a legal norm must, similarly, be the purpose of either the people who made it, or other people who subsequently use it, such as (a majority of) the community as a whole, or perhaps the judiciary, acting on the community’s behalf.<sup>62</sup>

It requires further argument to establish that the purpose of the lawmakers should be preferred to these alternatives, but because all the possibilities involve collectives, difficulties in explaining collective intentions provide no reason to prefer any one of them to the others.

Moreover, it is surely apparent that in the situations where SG regard purpose as obvious, it is made obvious not by the text alone, but by reading the text in the light of our commonsense understandings of the likely motivations that led to its composition. That is often how we deduce “the specific ill that prompted the statute.”<sup>63</sup> Such an inference amounts to “an assumption about the legal drafter’s desires,” which SG condemn as improper.<sup>64</sup> Moreover, if such common sense assumptions can be relied on as evidence of the lawmaker’s purposes, then perhaps other kinds of evidence can also be found—including extra-textual evidence.

Perhaps their most explicit acknowledgement that legislatures can have purposes that may assist interpreters in understanding their Acts is this:

[T]he prologue [to an Act] does set forth the assumed facts and the purposes that the majority of the enacting legislature . . . had in mind, and these can shed light on the meaning of the operative provisions that follow. And this is the view that

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<sup>62</sup> Jeffrey Goldsworthy, *Functions, Purposes and Values in Constitutional Interpretation*, in *AUSTRALIAN CONSTITUTIONAL VALUES* 44–45 (Rosalind Dixon ed., 2018).

<sup>63</sup> SCALIA & GARNER, *supra* note 1, at 219.

<sup>64</sup> *Id.* at 56.

courts and judges have taken for many years. . . . Justice Joseph Story wrote that “the preamble of a statute is a key to open the mind of the makers, as to the mischiefs, which are to be remedied, and the objects, which are to be accomplished by the provisions of the statute.”<sup>65</sup>

Here, the text of the statute expressly declares what the legislature’s purpose is. That may be consistent with strict textualism, but not with SG’s denial that legislatures can have any intention other than to enact the text. Indeed, the text itself explicitly contradicts that denial. SG could stick to their guns, and argue that even though the legislature cannot really have any intention or purpose other than to enact the text, if the text (mistakenly) asserts that the legislature did have some other intention or purpose, judges should pretend that it did, in order to comply with what amounts to a textual directive (albeit one based on a falsehood). But they do not seem to take that approach.

#### IV. PARTICULAR INTERPRETIVE ISSUES

##### A. *Textual Ambiguities*

SG concede that purpose can be crucial to resolving ambiguities and vagueness.<sup>66</sup> For example, “[*n*]ail in a regulation governing beauty salons has a different meaning from *nail* in a municipal building code.”<sup>67</sup> One kind of ambiguity arises when a word or phrase has both an ordinary, everyday meaning, and a specialized, technical meaning.<sup>68</sup> SG discuss various examples of a statutory word or phrase being found to have a technical meaning, but do not discuss how we decide between an ordinary and a technical alternative. Clearly, we resort to contextual evidence of purpose, but that is surely because it illuminates the drafters’ (and therefore the legislature’s) probable intended meaning. In accepting that the title and headings in a statute can help resolve ambiguities, SG say: “[i]n holding that the statute was indeed a felony statute, the [Mississippi Supreme Court] *rightly* stated: ‘If there is any uncertainty in the body of an act, the title may be resorted to for the purpose of ascertaining legislative intent and of relieving the ambiguity.’”<sup>69</sup>

I emphasize the word in *italics*. Again, this may be consistent with strict textualism, but not with SG’s denial that legislatures can have any intention other than to enact the text.

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<sup>65</sup> *Id.* at 218 (quoting 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 459 at 326 (2d ed. 1851)).

<sup>66</sup> SCALIA & GARNER, *supra* note 1, at 56.

<sup>67</sup> *Id.* at 20.

<sup>68</sup> *Id.* at 69–77.

<sup>69</sup> *Id.* at 222 (emphasis added) (quoting *Bellew v. Dedeaux*, 126 So.2d 249, 251 (Miss. 1961)).

### B. *Scrivener's errors*

SG admit that sometimes, if the literal meaning of the text is absurd, there must be an “error” that can be easily corrected.<sup>70</sup> What kind of error? It must apparently be an erroneous choice of words or punctuation marks by the drafter or scrivener,<sup>71</sup> “obviously a technical or ministerial error.”<sup>72</sup> But in what sense can a drafter or scrivener use a wrong word? Surely only if the word chosen does not accurately express what the lawmaker really meant, or intended, to communicate.

Scrivener's errors raise two issues, one metaphysical, and the other epistemic or evidential. The metaphysical issue is: if, due to a scrivener's error, the text does not accurately communicate the true law, then what is the true law? What alternative account is there to an intentionalist one, which posits that the true law must be the meaning that the lawmaker obviously intended to communicate? The epistemic or evidential issue is: on the basis of what evidence can we decide what the lawmaker obviously intended to communicate? For SG it must be other textual evidence, and they quote with apparent approval Justice Harlan's reference to “the law's object and design.”<sup>73</sup> But as we have seen, intentions and purposes are not derived unmediated from texts; they are derived by understanding texts in the light of our common sense understandings of likely human purposes. This is virtually conceded by SG when they say that the court should choose “the meaning that causes it [the text] to make sense”—that is, common sense.<sup>74</sup>

In discussing one example, SG say that “it is virtually certain that *winning party* was meant to be *losing party*.”<sup>75</sup> In other contexts, as well, they often refer to what a statute was “meant” to say or do.<sup>76</sup> This is all very curious. It immediately raises the question, “meant” by whom? Could they mean “meant by the legislator(s) who sponsored the statute”? Surely not: no group of legislators has law-making authority—only the assembly as a whole has that. So could they mean “meant by the assembly”? Again, surely not; to “mean” something is surely to have a certain kind of intention, and they deny that a legislative assembly can have any intention other than to enact a text.<sup>77</sup> The text—warts (including scrivener's errors) and all—is the only law that the assembly passed, and on their stated view the intention to pass it was the only intention that can sensibly be attributed

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<sup>70</sup> *Id.* at 234.

<sup>71</sup> *Id.* at 234–35.

<sup>72</sup> *Id.* at 238.

<sup>73</sup> *Id.* at 164–65.

<sup>74</sup> *Id.* at 236.

<sup>75</sup> *Id.* at 235.

<sup>76</sup> *E.g., id.* at 290, 294.

<sup>77</sup> *Id.*

to the assembly. Moreover, even if an assembly could have such an intention, they approve of Lord Reid's dictum that the courts "are seeking not what Parliament meant but the true meaning of what they said"—"the meaning of the words which Parliament used."<sup>78</sup>

In recounting one instance of such an error being corrected, SG quote—apparently with approval—the Arkansas Supreme Court's conclusion: "No doubt the legislature meant to repeal all laws in conflict with that act, and, by error of the author or the typist, left out the usual words 'in conflict therewith,' which we will imply by necessary construction."<sup>79</sup> They also quote, again with apparent approval, the following words of Justice Story, recommending that in very extreme cases of absurdity "the plain meaning of a provision . . . [may] be disregarded, because we believe the framers of that instrument could not intend what they say. . . ."<sup>80</sup> Both quotations are inconsistent with SG's denial that a legislature can intend (or mean) anything other than to enact a text, and their denial that a court should give effect to what the legislature meant rather than the meaning of the words it enacted.

As usual, they attempt to rely on an "objective" test, one that gives the text "the meaning that it objectively conveys" rather than "the meaning that was in the mind of the drafter."<sup>81</sup> They say that their approach involves "giving . . . [the text] the meaning that it would convey to a reasonable person, who would understand that misprints had occurred."<sup>82</sup> But that just postpones the difficulty, without resolving it. On what basis could a reasonable person conclude that there had been a misprint, other than the belief that no reasonable lawmaker could have meant (intended) what the text actually says? Indeed, SG concede that "[t]he absurdity must consist of a disposition that no reasonable person could intend."<sup>83</sup> But if it were explained to the reasonable person that this multi-member lawmaker simply could not have meant (i.e., intended) anything other than to enact the text, then surely the reasonable person would conclude—as elementary logic dictates—that there could not be any mismatch between the text and what this lawmaker intended, or meant. If a legislative assembly cannot have any intention except to enact the words of the text, then it is hard to see how a court could be justified in overriding those words on the ground that no reasonable person could have intended to enact them.

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<sup>78</sup> *Id.* at 394; *see also id.* at 375 n.33 (quoting a similar denial that interpreters should seek "what the legislature meant").

<sup>79</sup> *Id.* at 237 (quoting *Cernauskas v. Fletcher*, 201 S.W.2d 999, 1000 (Ark. 1947)).

<sup>80</sup> *Id.* at 237 (quoting 1 STORY, *supra* note 65, § 427 at 303).

<sup>81</sup> *Id.* at 238.

<sup>82</sup> *Id.* at 235.

<sup>83</sup> *Id.* at 237.

SG conclude their discussion by stating that “[t]he doctrine of absurdity is meant to correct obviously *unintended* dispositions, not to revise purposeful dispositions that . . . make little if any sense.”<sup>84</sup> To which one can only reply: just so!

### C. Presumptions

Many of the canons that SG endorse involve “presumptions,”<sup>85</sup> but what are these presumptions about? A quotation they endorse at the start of their discussion of one example expresses the long orthodox view: “[T]here is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning.”<sup>86</sup> The “presumptions” in general have traditionally been regarded as presumptions of what the legislature most likely intended.<sup>87</sup> SG quote one of Justice Scalia’s own judgments in which he refers to “generally applicable, background principles of assumed legislative intent,” against which, they add, “all laws are enacted.”<sup>88</sup>

SG treat the presumption of *mens rea* as such a tacit “background presumption” (as Justice Rehnquist put it).<sup>89</sup> They approvingly quote Justice Robert Jackson’s statement that “[a]s the states codified the common law of crimes, . . . their courts . . . recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation.”<sup>90</sup> They also approve of the Supreme Court’s statement that “where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word . . . and the meaning its use will convey to the judicial mind unless otherwise instructed.”<sup>91</sup> They say that “legislators . . . have reason to assume” that “consistent judicial practice” will be followed.<sup>92</sup> But it should be noted that this “background assumptions” explanation of *mens rea* seems to be

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<sup>84</sup> *Id.* at 239.

<sup>85</sup> *See id.* at 437 (listing legal presumptions).

<sup>86</sup> *Id.* at 170 (quoting Justice Sutherland in *Atlantic Cleaners & Dryers v. United States*, 286 U.S. 427, 433 (1932)).

<sup>87</sup> *See id.* at 285 (discussing the “presumed legislative intent” of the statutes of limitations for suits against the government); *see also id.* at 288 (discussing the Supreme Court’s requirement of a clear expression of congressional intent in *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984)).

<sup>88</sup> *Id.* at 308–09 (quoting Justice Scalia in *Brogan v. United States*, 522 U.S. 398, 406 (1998)).

<sup>89</sup> *Id.* at 303 (quoting *United States v. X-Citement Video*, 513 U.S. 64, 70 (1994)).

<sup>90</sup> *Id.* at 304 (quoting *Morissette v. United States*, 342 U.S. 246, 252 (1952)).

<sup>91</sup> *Id.* at 305; *see also id.* at 320–21 (discussing the principle that undefined words in a statute are interpreted according to their common-law meaning).

<sup>92</sup> *Id.* at 307–08.



contradicted by their describing it as being “read[] into” statutes—an example of “the insertion of a requirement that the text does not contain.”<sup>93</sup>

Many of their canons appear to be based on generalizations concerning what those who use certain forms of words usually mean (or intend) by doing so—or what Max Radin called (with SG’s apparent approval) “ordinary habits of speech.”<sup>94</sup> For example, in justifying the presumption against retroactivity, their first sentence is: “As a general, almost invariable rule, a legislature makes law for the future, not for the past.”<sup>95</sup> Thus “[s]tatutes . . . typically pronounce what the law becomes when the statutes take effect.”<sup>96</sup> Similarly, the presumption against federal pre-emption “is based on an assumption of what Congress, in our federal system, would or should normally desire.”<sup>97</sup> Again, “[s]ince the rise of the nation-state, countries have avoided subjecting people to conflicting laws” by regulating action within their territorial jurisdictions, and “[i]t has long been assumed that legislatures enact their laws with this territorial limitation *in mind*.”<sup>98</sup>

But the canons are defeasible because these generalizations are not always applicable. Sometimes it is clear—either by explicit words or “clear implication”—that the legislature had an unusual intention that contradicts the relevant presumption, although courts are reluctant to draw that conclusion.<sup>99</sup> As SG observe in relation to one canon, it “must be applied with judgment and discretion . . . because (as with most canons) the underlying proposition is not *invariably* true. Sometimes drafters *do* repeat themselves and *do* include words that add nothing of substance . . . .”<sup>100</sup> Later they say that “[t]he imperative of harmony among provisions is more categorical than most other canons of construction because it is invariably true that intelligent drafters do not contradict themselves . . . .”<sup>101</sup> But even this harmonious-reading canon is defeasible, if “context and other considerations (including the application of other canons) make it impossible to apply . . . .”<sup>102</sup> SG often quote—with apparent approval—

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<sup>93</sup> *Id.* at 307–08, 310; *see also id.* at 312 (observing that *mens rea* is often read into statutory texts, citing the Model Penal Code as an example).

<sup>94</sup> *Id.* at 211 (quoting Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 874 (1930)).

<sup>95</sup> *Id.* at 261.

<sup>96</sup> *Id.* Admittedly, they go on to rely partly on normative justifications—the rule of law and justice—but that comes afterwards.

<sup>97</sup> *Id.* at 293.

<sup>98</sup> *Id.* at 268 (emphasis added).

<sup>99</sup> *E.g., id.* at 261–62 (noting that the presumption against retroactivity is “a canon of interpretation and not a rule of constitutional law,” hence a statute can be made retroactive).

<sup>100</sup> *Id.* at 176.

<sup>101</sup> *Id.* at 180.

<sup>102</sup> *Id.*

judicial statements to the effect that the legislature is presumed not to intend something, unless it clearly expresses an intention to do so.<sup>103</sup>

#### D. Implications

SG accept “the principle that a text does include not only what is express but also what is implicit”<sup>104</sup>—what it “fairly implies.”<sup>105</sup> “The full body of a text contains implications that can alter the literal meaning of individual words.”<sup>106</sup> The skillful and honest judge can distinguish between filling gaps in the text—which is impermissible—and “determining what the text implies.”<sup>107</sup> They refer to something being “textually implied,”<sup>108</sup> and assert “there is such a thing as utterly clear implication.”<sup>109</sup>

Statutory interpretation is, of course, frequently concerned with implications. One kind is the so-called “necessary implication”; SG approvingly quote one writer who said: “A judge may not add words that are not in the statute, save only by way of necessary implication.”<sup>110</sup> Their leading example is the “predicate-act canon,” which holds that “when a text authorizes a certain act, it implicitly authorizes whatever is a necessary predicate of that act.”<sup>111</sup> Other kinds of implication they discuss include repeal by implication, the *ejusdem generis* canon,<sup>112</sup> and the “negative implication” known as *expressio unius est exclusio alterius*.<sup>113</sup>

It is a general truth that, apart from strict logical entailment, what is implicit in or implied by a text is not determined solely by the meanings of its words together with rules of grammar. Some additional ingredient is also required, the most likely candidate being contextual evidence of the intention or purpose of the text’s author. The challenge for SG is therefore to explain what is implicit or implied consistently with their denial that legislatures can have intentions (which entails that they cannot have purposes either).

In explaining *expressio unius*, SG employ an everyday analogy: “When a car dealer promises a low financing rate to ‘purchasers with good

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<sup>103</sup> *E.g.*, *id.* at 271–72 (presumption against extraterritoriality); *id.* at 282 (presumption against binding the sovereign); *id.* at 291 (presumption against federal pre-empting); *id.* at 297 (rule of lenity).

<sup>104</sup> SCALIA & GARNER, *supra* note 1, at 96.

<sup>105</sup> *Id.* at 16.

<sup>106</sup> *Id.* at 356.

<sup>107</sup> *Id.* at 97. *See, e.g.*, *id.* at 99–100 (criticizing as incorrectly decided *Riggs v. Palmer*, 22 N.E. 188 (N.Y. 1889), where the court held that a grandson could not inherit under the will of his grandfather, whom he had murdered, although the relevant statute included no provision to that effect).

<sup>108</sup> SCALIA & GARNER, *supra* note 1, at 306.

<sup>109</sup> *Id.* at 282.

<sup>110</sup> *Id.* at 93 n.1. *See id.* at 97 (providing an example of an implicit requirement being found in a statute).

<sup>111</sup> SCALIA & GARNER, *supra* note 1, at 96–97, 192–94.

<sup>112</sup> *Id.* at 199.

<sup>113</sup> *Id.* at 107–11.

credit,' it is entirely clear that the rate is *not* available to purchasers with spotty credit."<sup>114</sup>

This is certainly true, but what is the basis for the clear implication? It is not solely the linguistic or semantic meaning of the promise. It is the reasonable inference that by singling out purchasers with good credit, the car dealer implies that he will not provide the low rate to those with spotty credit. Philosophers of language explain such inferences in terms of a general (but defeasible) presumption that speakers and authors attempt to communicate in a co-operative fashion, by respecting norms of communication enjoining 'quality' (speak truthfully based on evidence), 'quantity' (say enough but no more than enough to be informative), 'relevance' (speak relevantly to some interest of the hearer) and 'manner' (be clear, unambiguous, brief and orderly).<sup>115</sup> If the dealer's promise was not fully informative as to the availability of the low financing rate, at least in relation to credit-worthiness—if, in other words, purchasers with spotty credit were also eligible for that rate—the promise would violate the norm of quantity and be seriously misleading. That is why the promise is taken to imply that *only* purchasers with good credit will be offered a low financing rate. But this analysis depends on a presumption that the speaker or author has at least two intentions—to comply with conventional norms of communication, and therefore to imply something not communicated by explicit words—in addition to the much thinner intention to enunciate a particular sequence of words.

SG say (correctly) that whether or not there is such an implication depends on the particular context. A sign "no dogs allowed," outside a restaurant, does not imply that other animals such as pet monkeys are permitted; the sign deals with the pet most likely to be brought into a restaurant, and not with unusual, exotic pets. On the other hand, a sign outside a veterinary clinic stating "Open for treatment of dogs, cats, horses, and all other farm and domestic animals" would imply that exotic animals, such as a circus lion, are not treatable there. The more carefully worded and detailed nature of the sign suggests that the author has made an effort to be precise. The best explanation for why these contextual details are relevant is surely that they are evidence of the author's likely communicative intentions. SG quote the following from a learned author: "[I]f Parliament in legislating speaks only of specific things and specific

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<sup>114</sup> *Id.* at 107.

<sup>115</sup> These are Grice's four 'maxims of conversation'; his 'neo-Gricean' successors have proposed refined and simplified versions of his theory. For a brief overview, see Robyn Carston, *Legal Texts and Canons of Construction: A View from Current Pragmatic Theory*, in 15 *LAW AND LANGUAGE: CURRENT LEGAL ISSUES* 8–16 (Michael Freeman & Fiona Smith eds., 2013).

situations, it is a legitimate inference that the particulars exhaust *the legislative will*.”<sup>116</sup>

Precisely.

At one point, SG criticize “the slippery reference to *intent* . . . as opposed to meaning,”<sup>117</sup> yet on the very next page, in discussing the *ejusdem generis* canon (which concerns a kind of implication), they say:

The rationale for the *ejusdem generis* canon is twofold: When the initial terms all belong to an obvious and readily identifiable genus, one presumes that the speaker or writer has that category *in mind* for the entire passage. . . . And second, when the tagalong general term is given its broadest application, it renders the prior enumeration superfluous. If the testator [in a previous example] really *wished* [to convey a different outcome], he could simply have [used the general term].<sup>118</sup>

They later add that the canon applies only to general terms that follow the enumeration of specific and related items, and not to a general term that follows a single item (as in a bequest of “my car and all other property”). This is because “[t]here is no reason to conclude, from the single specification of *car*, that the testator had only personal property in mind.”<sup>119</sup> This amounts to justifying the canon directly on the basis of the likely intentions of speakers and authors, evidenced by the “ordinary habits of speech” noted by Max Radin.<sup>120</sup> Moreover, in applying the canon one must identify the genus constituted by the specific listed items, which they say is often made clear by “the evident purpose of the provision.”<sup>121</sup> Again, they would say that such a purpose is inferred directly from the text, but unless the purpose is explicitly stated in the text, it must be inferred from something in addition to the text, such as our common sense understanding of the likely purpose of the text’s author.

It is telling that in explaining implications such as that of implied repeal SG quote, with apparent approval, judges and authors who refer to intentions. For example, Justice Sutherland stated that an implied repeal is found “if the later act covers the whole subject of the earlier one and is

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<sup>116</sup> SCALIA & GARNER, *supra* note 1, at 108 (emphasis added) (quoting J.A. Corry, *Administrative Law and the Interpretation of Statutes*, 1 U. TORONTO L.J. 286, 298 (1936)).

<sup>117</sup> *Id.* at 198.

<sup>118</sup> *Id.* at 199–200 (emphasis added). See also *id.* at 210 (describing how a court “quite properly” refused to apply the canon because the statutory words “by necessity show an intent to go beyond the whole field” previously mentioned (quoting *Knoxenn Theatres, Inc. v. McCanless*, 151 S.W.2d 164, 165–66 (Tenn. 1941))).

<sup>119</sup> *Id.* at 206.

<sup>120</sup> *Id.* at 211 (internal quotation marks omitted) (quoting Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930)).

<sup>121</sup> *Id.* at 208.

clearly intended as a substitute.”<sup>122</sup> That is surely right; it is hard to see how any Act could cover the whole subject-matter, without purporting to do so explicitly, other than by manifesting in its policy context the legislature’s unexpressed intention to do so.<sup>123</sup> SG quote Justice Miller who said in 1875 that “[a] careful comparison of these two sections . . . can leave no doubt that it was the intention of Congress, by the later statute, to revise the entire matter.”<sup>124</sup>

SG also discuss implications in a section dealing with whether statutes create rights of action. They quote judicial statements to the effect that this depends partly on whether there is an “indication of legislative intent, explicit or implicit . . . to create such a remedy,”<sup>125</sup> which the Supreme Court later described as “the central inquiry,” other considerations such as “the language and focus of the statute, its legislative history, and its purpose” being “traditionally relied on in determining legislative intent.”<sup>126</sup> SG add: “Courts should not look at large for ‘congressional intent’ . . . ; they should look for the fair import of the statute.”<sup>127</sup> The implication must be “based on the text of the statute—not exclusively on its purpose.”<sup>128</sup> The qualifiers “at large” and “exclusively” are telling; they rule out investigations into legislative intent or purpose that are unconfined (“at large”) or ignore the text (“exclusive”), but remain consistent with legislative intent or purpose being at least relevant, and probably crucial.

### E. *Conflicting Canons*

SG acknowledge that “various canons of interpretation [can] point to different outcomes, requiring sound judgment as to which have the strongest force.”<sup>129</sup> But what exactly can this “sound judgment” be seeking if the canons conflict? Surely it must be aimed at which of the canons appears to provide the weightiest evidence of what the drafters or lawmakers intended in employing the words they chose. What other criterion could possibly resolve the conflict? As Richard Ekins and I have said,

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<sup>122</sup> *Id.* at 328 (internal quotation marks omitted) (quoting *Posadas v. Nat’l City Bank of N.Y.*, 296 U.S. 497, 503 (1936)).

<sup>123</sup> This is consistent with the possibility that in some cases, the court imputes a fictional intention to cover the field because, although the legislature never contemplated the matter, it would better serve its apparent purpose.

<sup>124</sup> *Id.* at 330 (quoting *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 617 (1875)).

<sup>125</sup> *Id.* at 314 (quoting *Cort v. Ash*, 422 U.S. 66, 78 (1975)).

<sup>126</sup> *Id.* at 31 (quoting *Touche-Ross & Co. v. Redington*, 442 U.S. 560, 575–76).

<sup>127</sup> *Id.* at 316.

<sup>128</sup> *Id.* at 317.

<sup>129</sup> *Id.* at 159.

an attempt to apply the orthodox principles [or canons] without believing in an independently existing intention is likely to become an artificial, pointless and debilitating exercise, like perpetuating religious rituals after abandoning belief in God. If there is no such intention to serve as the lodestar guiding application of the principles [or canons], interpretation is likely to become a kind of game played to reach desired results. If the fundamental principle of statutory interpretation [to seek the legislature's communicative intention] is set aside, many of the traditional maxims and presumptions of interpretation will seem like a jumble of mutually contradictory directives, able to be selectively marshalled to support whatever interpretation is preferred on policy grounds. The American legal realist, Karl Llewellyn, provided the classic account of that predicament.<sup>130</sup> On the other hand, when it is understood that clarification of a statute's meaning requires taking into account all admissible evidence of legislative intention, it can be appreciated that there may be many items of evidence—some pointing one way, some another—and that a final judgment requires weighing them against one another. Sceptics about legislative intention lack an intelligible criterion or object to determine how to weigh these items, and can only play the game depicted by Llewellyn.<sup>131</sup>

Those who truly believe that lawmakers lack any intention other than to enact a text must be hard-pressed to propose any plausible means of resolving conflicts between the interpretive canons in order to avoid playing Llewellyn's game.

#### V. SG'S FALSE DICHOTOMIES

SG reject an exaggerated form of intentionalism, which holds that “enacted texts merely evoke or suggest—as opposed to state—what the true law is,” namely, “the legislative intent or will.”<sup>132</sup> They insist, to the contrary, that the statute *is* the true law, not merely evocative or suggestive evidence of it.<sup>133</sup> This is true, but it relies on a dichotomy that is far too simplistic to dispose of intentionalism. It overlooks the fact (which they

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<sup>130</sup> Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 395 (1950).

<sup>131</sup> Ekins & Goldsworthy, *supra* note 19, at 43.

<sup>132</sup> SCALIA & GARNER, *supra* note 1, at 397 (citation omitted).

<sup>133</sup> *Id.*

acknowledge<sup>134</sup>) that the meaning of the statute must be more than the literal meanings of its words; for example, a statute may include implications, and even what it *says* may often depend partly on contextual evidence of the lawmakers' communicative intentions (as in the case of textual ambiguities that can be contextually disambiguated). What the text actually *communicates* is necessarily determined by contextual as well as textual evidence of those intentions. That is what sensible intentionalists mean when they say that both text and context are evidence of the lawmaker's communicated intentions, which are what constitutes the law.<sup>135</sup> The law enacted by the statute consists of the norms that the enactment of the statute's text, understood in its context, communicates to the community, which the community understands by inferring from both text and context what norms the lawmaker intended to communicate. Confusion may be caused by phrases such as "the meaning of the text" being ambiguous. Intentionalists are right to assert that the literal meaning of the text (that is, devoid of context) is not the meaning of the law, but merely evidence of the law.<sup>136</sup> SG are right to assert that the meaning of the text, understood in its full context, is the meaning of the law.<sup>137</sup> But that amounts to the meaning that the lawmaker appears to have intended to communicate.

SG also approvingly quote Lord Reid's dictum that the courts "are not seeking what Parliament meant but [rather] the true meaning of what they said"—"the meaning of the words which Parliament used."<sup>138</sup> Many other well-known quotations to the same effect are quoted by SG, but taken at face value these lead interpretive theory into incoherence.<sup>139</sup> Such statements trade on a similarly simplistic and false dichotomy between the meaning of the enactment and the legislature's intentions, as if we must choose either one or the other. For example, SG reject the assumption "that what we are looking for is the intent of the legislature rather than the meaning of the statutory text. That puts things backwards."<sup>140</sup> But it is quite misleading to draw such a dichotomy. The truth—comprehensively corroborated by SG's own analyses—is that the meaning of the text depends on contextual as well as the textual evidence of what the legislature intended the enactment of the text to communicate.

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<sup>134</sup> See *supra* note 7 and accompanying text.

<sup>135</sup> See SCALIA & GARNER, *supra* note 1, at 397 (discussing how intentionalist theories maintain that the statute itself is not the law "but only *evidence* of it").

<sup>136</sup> See *id.* ("The statute is not the law, but only *evidence* of it?").

<sup>137</sup> See *id.* (disagreeing with the intentionalist view that "enacted texts merely evoke or suggest—as opposed to state—what the true law is").

<sup>138</sup> *Id.* at 394.

<sup>139</sup> See *id.* at 29 n.96, 375, 391, 395 n.12, 398 (referencing various quotations from Holmes, Lord Scarman, Dias, Tribe, and Fried).

<sup>140</sup> *Id.* at 375.

SG trade on yet another false dichotomy when they say that purposivists seek “to give the text not the meaning that it objectively conveys but the meaning that was in the mind of the drafter.”<sup>141</sup> If, as Ekins and I have advocated, courts continue to confine themselves to publicly available evidence of “the meaning that was in the mind of the drafter,” then that can and should be regarded as “the meaning that [the text] objectively conveys.”<sup>142</sup>

## VI. CANONS UNRELATED TO LEGISLATIVE INTENTION

It is not my thesis that *every* canon or presumption of statutory interpretation concerns the clarification of legislative intention. Ekins and I have acknowledged that some of them may help guide the creative judicial supplementation or rectification of statutory meaning.<sup>143</sup> If so, then SG may be justified in suggesting that the courts have created some canons to implement judicial policies rather to clarify inherent meaning.<sup>144</sup> If SG were to persist in denying that legislative intentions exist, except for intentions to enact texts, then perhaps they should explain all interpretive canons and presumptions in terms of implementing judicial policies rather than clarifying inherent meaning. But that would be a very uncomfortable position for them, because it would amount to approving of the judiciary having, for centuries, wielded enormous power to shape the contents of statutes. It would endorse the judges being, in effect, the co-authors of every statute. That would be contrary to SG’s complaints that historically “judges who used to be lawgivers took some liberties with the statutes that began to supplant their handiwork,”<sup>145</sup> and that some judges still “refuse to yield the ancient judicial prerogative of making the law, improvising on the text to produce what they deem socially desirable results.”<sup>146</sup> SG appear to oppose even the judicial supplementation of statutory meaning when a provision is intractably ambiguous or otherwise indeterminate; they suggest that rather than judges making law to resolve the indeterminacy, they should declare such a provision to be “meaningless and hence inoperable.”<sup>147</sup> SG insist that “good judges dealing with statutes do *not*

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<sup>141</sup> *Id.* at 238.

<sup>142</sup> Ekins & Goldsworthy, *supra* note 19, at 59; *see supra* Section III; SCALIA & GARNER, *supra* note 1, at 238.

<sup>143</sup> Ekins & Goldsworthy, *supra* note 19, at 61–62. For more detail, see Jeffrey Goldsworthy, *The Implicit and the Implied in a Written Constitution*, in *THE INVISIBLE CONSTITUTION IN COMPARATIVE PERSPECTIVE* 109, 111–112 (Rosalind Dixon & Adrienne Stone eds., 2018) (discussing the creative interpretive role of judges).

<sup>144</sup> SCALIA & GARNER, *supra* note 1, at 30–31, 249, 296.

<sup>145</sup> *Id.* at 3.

<sup>146</sup> *Id.* at 4.

<sup>147</sup> *Id.* at 34, 135, 137, 298. *But see id.* at 22 (“The common response of purposivists and consequentialists to criticisms of their theories is that textualism, with its cross-cutting canons and



make law. They do not ‘give new content’ to the statute, but merely apply the content that has been there all along, awaiting application to myriad factual scenarios.”<sup>148</sup> This is inconsistent with all or most of the interpretive canons being understood as implementing judicial policies.

### CONCLUSION

SG’s denial that legislatures can have any intentions other than to enact particular texts would, if adhered to rigorously, make their version of textualism unviable. It is inconsistent with context and purpose being used to (a) dispel ambiguities, (b) correct scrivener’s errors, (c) reveal presumptions or background assumptions that qualify literal textual meanings, (d) reveal most kinds of implicit and implied content, and (e) resolve conflicts between the canons. It would, in other words, entail hyperliteralism, which SG explicitly reject.<sup>149</sup>

This is no doubt why, as I have shown, they do not rigorously adhere to that denial. To the contrary, in accepting that context and purpose can be used to do all these things, they frequently rely on legislatures having intentions in addition to merely enacting statutory texts. These include: (a) intentions that statutory language has particular meanings,<sup>150</sup> (b) intentions that those meanings communicate particular norms,<sup>151</sup> and (c) intentions (called purposes) that those norms should achieve particular objectives.<sup>152</sup> Notwithstanding their theoretical dismissal of substantive legislative intentions as non-existent, SG’s actual interpretive practice confirms the intentionalist thesis that sensible interpretation of enacted laws necessarily presupposes the existence of such intentions, and endeavors to reveal and clarify them.<sup>153</sup> Whatever the difficulties of explaining the existence and nature of collective intentions—a relatively recent research program that has already made great progress—we seem to have no practicable alternative other than to keep interpreting enacted laws on the assumption that such intentions exist.<sup>154</sup>

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competing principles, does not always provide a clear answer and hence can also be subjectively manipulated.”).

<sup>148</sup> *Id.* at 5.

<sup>149</sup> *Supra* note 7 and accompanying text.

<sup>150</sup> *Supra* Part IV.A.

<sup>151</sup> *Supra* Parts IV.A, IV.B, and IV.C.

<sup>152</sup> *Supra* Part III.C.

<sup>153</sup> *Supra* notes 20 and 21 and accompanying text.

<sup>154</sup> See Carston, *supra* note 115, at 25 (“A statute is treated—not by choice, but because there is no alternative if the concept of a statute is to be intelligible—as if it were a purposive statement made by a person or a group of persons.” (quoting Stephen Neale, *Textualism with Intent* 61 (Nov. 4, 2008) (unpublished manuscript))).